In The
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 78-6809

DENNIS SEAY JENKINS,

Petitioner,

v

CHARLES ANDERSON, Warden, State Prison for Southern Michigan at Jackson, Michigan,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

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OPINIONS BELOW

Defendant Jenkins was convicted by a jury of manslaughter on November 20, 1974 in the Recorder's Court of Detroit, Michigan. On appeal to the Michigan Court of Appeals, *People* v *Jenkins*, No. 22715 (May 3, 1976) the Court granted the State's Motion to Affirm the conviction in an unreported per curiam order, "for the reason that the questions sought to be reviewed are so unsubstantial as to need no argument or formal submission." In another unreported per curiam order dated June 16, 1976 the Michigan Court of Appeals, one judge of the three-judge panel dissenting, denied Defendant's Application for Rehearing, "for lack of merit in the grounds presented." The Michigan Supreme Court in a per curiam order with one justice dissenting, *People* v *Jenkins*, 399 Mich 874 (No. 58452, March 25, 1977) denied Defendant's Applica-

tion for Leave to Appeal, "because the appellant has failed to persuade the Court that the questions presented should be reviewed by this Court." An Application for Reconsideration was denied, "because it does not appear to the Court that said order was entered erroneously." *People* v *Jenkins*, 401 Mich 809 (No. 58452, August 31, 1977).

In a Judgment and Order of Dismissal dated November 13, 1978 the United States District Court for the Eastern District of Michigan, Southern Division, adopted the findings and conclusions contained in the Magistrate's Report and dismissed Defendant's Petition for Writ of Habeas Corpus. *Jenkins* v *Anderson, Warden*, docket no. 7-72690. (App 17, 18). In an order filed May 4, 1979 the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court. *Jenkins* v *Anderson, Warden*, docket no. 79-1011. (App 19). A rehearing was denied by the Court of Appeals in an order filed May 29, 1979. (App 21).

JURISDICTION

The order of the Court of Appeals affirming the Judgment of Dismissal entered by the District Court was entered on May 4, 1979 and a Motion for Rehearing was denied by an order dated May 29, 1979. In a timely Petition for Writ of Certiorari this Court's jurisdiction was invoked under 28 USC § 1254(1). On October 1, 1979 this Court granted the Petition for a Writ of Certiorari. (App 57).

QUESTION PRESENTED

In a state court murder trial which arose out of a stabbing incident in which the Defendant fled from the scene and was not apprehended until more than two weeks later, were De-

fendant's constitutional rights violated by the prosecutor's cross-examination and comments to the jury concerning the Defendant's actions prior to his arrest?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment V, (in pertinent part):

> "No person . . . shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law . . . ."

United States Constitution Amendment XIV, § 1, (in pertinent part):

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

MCLA 750.316; MSA 28.548:

> "All murder which shall be perpetrated by means of poison, or lying in wait, or any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery, burglary, larceny of any kind, extortion or kidnapping, shall be murder of the first degree and shall be punished by solitary confinement at hard labor in the state prison for life."

STATEMENT OF THE CASE

On August 13, 1974 Doyle Redding was stabbed to death by Petitioner Dennis Jenkins (hereinafter generally referred

to as Defendant). Following the stabbing, Defendant fled from the scene and was not apprehended until more than two weeks later, when he turned himself in. Petitioner was charged with first degree murder, but was convicted by a jury of the lesser included offense of manslaughter and was sentenced to a term of 10 to 15 years imprisonment. Respondent Warden (hereinafter generally referred to as the state) accepts as accurate the summaries of witnesses' testimony which are contained on pages 2-5 of the Brief for Petitioner. For purposes of this appeal, suffice it to say that in the course of Defendant's state court trial the prosecutor cross-examined him as to his actions following the stabbing incident, and particularly as to whether Defendant had reported the stabbing incident to anyone during the two-week period between the stabbing and his arrest. During closing argument the prosecutor suggested to the jury that Defendant might have been using that time to "line up" defense witnesses and to discuss their potential testimony with them. Most of the relevant portions of the cross-examination and arguments of counsel are reproduced on pages 8-12 of the Brief for Petitioner.

SUMMARY OF ARGUMENT

At trial Defendant made no objection on constitutional grounds to the prosecutor's cross-examination and jury argument regarding the Defendant's flight from the scene of the crime and subsequent failure to report the incident to the police for more than two weeks. Because of this failure to object, Defendant is precluded, in this habeas corpus proceeding, from raising the issue.

Assuming that Defendant may raise the issue, it is apparent that the Fifth Amendment prohibition against compelled self-incrimination was not violated by the prosecutor's actions because the evidence of which Defendant complains was not,

in the sense of the Fifth Amendment, testimonial in nature and was not compelled. The Fifth Amendment does not preclude admission of voluntary actions and statements and the circumstances of this case indicate that Defendant's flight from the scene of the crime and subsequent failure to report the incident were entirely voluntary and uncoerced.

The admission of evidence regarding Defendant's flight from the scene and subsequent failure to report the stabbing incident did not violate his right to due process and a fundamentally fair trial. Unlike the silence upon which the prosecutor impermissibly commented in *Doyle* v *Ohio*, 426 US 610 (1976) Defendant's actions in this case were not "insolubly ambiguous." Evidence of Defendant's actions was of a type which has historically been admissible in criminal proceedings, had significant probative value (particularly as to his credibility) and minimal prejudicial effect since Defendant offered to the jury his own explanation for his actions.

Even if the prosecutor's actions are somehow deemed to have violated Defendant's constitutional rights, any such violation was harmless beyond a reasonable doubt since by its manslaughter verdict the jury obviously rejected the prosecution's charge that the killing was committed with intent and premeditation and accepted the Defendant's story of a confrontation and struggle between himself and the deceased.

ARGUMENT

I.

DEFENDANT'S FIFTH AMENDMENT PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION WAS NOT VIOLATED BY THE PROSECUTOR'S CROSS- EXAMINATION AND JURY ARGUMENT CONCERNING DEFENDANT'S FLIGHT FROM THE SCENE OF THE STABBING AND FAILURE TO TURN HIMSELF IN FOR TWO WEEKS.

After stabbing the victim, Defendant Jenkins fled from the scene and remained in concealment for more than two weeks until he turned himself in to the Mayor of Detroit, with much attendent publicity. At trial he claimed the stabbing had been done in self-defense and on cross-examination acknowledged the two-week delay in reporting the incident to the police. App 34. In closing argument, the prosecutor suggested to the jury that the Defendant might have used this two-week period to line up witnesses who would support his story that there had been a struggle before the stabbing. Under these circumstances the State submits that the Fifth Amendment privilege against compelled self-incrimination is simply inapposite and that the prosecutor's actions violated none of Defendant's constitutional rights.

It must first be noted that although Defendant now objects on constitutional grounds to the prosecutor's cross-examination and jury argument, no objection on these grounds was made at trial. Defense counsel did object to a portion of the cross-examination on the grounds of relevancy (App 33) and did object to a portion of the jury argument on the ground that it "is an improper inference from the testimony" (App 43) but it is conceded at page 12 of Defendant's brief in this

Court that no constitutional objections were made at trial. Defendant also acknowledges that it is the general rule in Michigan that preservation of a question for appellate review requires timely objection or a motion in the trial court (Petitioner's brief page 12). The existence of such a contemporaneous objection requirement is in fact included within the Michigan General Court Rules, GCR 1963, 507.5:

> "Formal exceptions to rulings or orders of the court are unnecessary. It is sufficient that a party, at the time of the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefore; and if a party has no opportunity to object to a ruling or order at the time it is made, the absence of the objection does not thereafter prejudice him.'"

Pursuant to this Michigan requirement, it was incumbent upon the Defendant to make his objection on constitutional grounds at the time of the prosecutor's actions which he now attempts to challenge and his failure to do so precludes him from raising the issue now. See *Schmerber* v *California*, 384 US 757, 765 fn 9 (1966).

In *Francis* v *Henderson*, 425 US 536 (1976) and *Wainwright* v *Sykes*, 433 US 72 (1977) this Court held that considerations of comity and federalism require that recognition be given to a state contemporaneous objection requirement and, where a defendant has failed to make a timely objection and has not demonstrated cause for that failure and actual prejudice, he is thereafter precluded from bringing that challenge in a federal habeas corpus proceeding. In the present case it is conceded that Michigan has a contemporaneous objection rule and that Defendant did not make a timely challenge to the prosecutor's actions on the constitutional grounds which he

now seeks to assert. Additionally, defendant has made no showing of any cause for this failure to object and has demonstrated no actual prejudice and therefore the State submits that he is precluded from making that challenge now.

Throughout the brief for Defendant the Fifth Amendment privilege is characterized as a "right to remain silent." While this may be a convenient shorthand reference, it fails as a complete explication of the boundaries of the privilege. The Fifth Amendment does not prohibit the prosecution's use of all statements or silence of a defendant; the *sine qua non* of the Fifth Amendment privilege is protection against use of *compelled* testimony. United States Const Am V provides in pertinent part:

> "No person . . . shall be compelled in any Criminal Case to be a witness against himself . . . ."

Under the circumstances of this case the State submits that the Defendant's actions (flight from the scene of the stabbing and failure to report the incident for two weeks) are not testimonial, and certainly were not compelled.

Although this case involves a state prosecution, the Fifth Amendment privilege is applicable in such proceedings, *Malloy* v *Hogan*, 378 US 1, 8 (1964):

> "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent *unless he chooses to speak in the unfettered exercise of his own will*, and to suffer no penalty . . . for such silence." (emphasis added).

It is axiomatic that not all incriminating evidence given by a defendant is barred by the Fifth Amendment privilege. In

order to invoke the privilege, there must be a threshhold determination that a particular communication was testimonial in nature. This requirement was recently discussed by this Court in the context of upholding enforcement of summonses served by the Internal Revenue Service on taxpayers' attorneys, directing the attorneys to produce documents possessed by the taxpayers. Although the Fifth Amendment privilege as it pertains to the production of documents involves somewhat different considerations than in the instant case, the following discussion is relevant, *Fisher* v *United States*, 425 US 391, 408 (1976):

> "It is also clear that the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a *testimonial* communication that is incriminating. We have, accordingly, declined to extend the protection of the privilege to the giving of blood samples, *Schmerber* v *California*, 384 US 757, 763-764, 16 L Ed 2d 908, 86 S Ct 1826 (1966); to the giving of handwriting exemplars, *Gilbert* v *California*, 388 US 263, 265-267, 18 L Ed 2d 1178, 87 S Ct 1951 (1967); voice exemplars, *United States* v *Wade*, 388 US 218, 222-223, 18 L Ed 2d 1149, 87 S Ct 1926 (1967); or the donning of a blouse worn by the perpetrator, *Holt* v *United States*, 218 US 245, 54 L Ed 1021, 31 S Ct 2 (1910)." (emphasis in original)

In the present case, it is not at all evident that the Defendant's actions were testimonial in sense of the Fifth Amendment. While the acts of flight from the scene of a crime and failure to report the stabbing incident undoubtedly have some communicative aspects in that they have evidentiary value, those actions are certainly far different in character than traditional tesimony from a witness stand. The situation in the instant case is somewhat like that which existed in *California*

v *Byers*, 402 US 424 (1971) in which this Court upheld a California statute which required the driver of a motor vehicle involved in an accident to stop at the scene and give his name and address. This Court concluded that compelling such information did not violate the Fifth Amendment privilege and, in an opinion of four members who had concurred in the result it was said that the disclosure of name and address is "an essentially neutral act," 402 US at 432, which was not testimonial since it "identifies but does not by itself implicate anyone in criminal conduct," 402 US at 434. The same four members of the Court also agreed with the following statement, 402 US at 434:

> "There is no constitutional right to refuse to file an income tax return or to flee the scene of an accident in order to avoid the possibility of legal involvement."

So, too, in the instant case. The effect of the prosecutor's cross-examination and jury argument did not directly implicate Defendant in the commission of a crime; rather it merely undermined his credibility by pointing out to the jury that he had not disclosed his identity to police officers investigating the commission of a crime.

Even if Defendant's actions of fleeing the scene of the stabbing and failing to report the incident to the police for two weeks are considered testimonial, they were in no sense "compelled" and therefore no violation of the Fifth Amendment privilege occurred.

In almost any case involving an assertion of Fifth Amendment privileges, it is necessary to discuss the very prominent case of *Miranda* v *Arizona*, 384 US 436 (1966). There this Court held that before statements obtained from an individual who is subjected to custodial police interrogation are admissible, the individual must first be warned that he has a right

to remain silent, that any statement he does make may be used as evidence against him and that he has a right to the presence of an attorney, either retained or appointed. While the *Miranda* decision is itself not controlling in the present case because there was no custodial interrogation (defined in *Miranda*, 384 US at 444, as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way"), much of the Court's Fifth Amendment analysis is relevant to the instant case. The underlying basis for the *Miranda* decision was this Court's conclusion that custodial interrogation necessarily involves inherent compulsion. Any statements made in such an inherently compelling atmosphere are presumptively obtained in violation of the Fifth Amendment privilege and therefore, "Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." 384 US at 458. For this reason the Court enunciated a set of procedures which the police must follow in order to advise individuals of their consitutional rights.

With respect to the instant case, it must be noted that the *Miranda* court specifically stated that voluntary statements are admissible, 384 US at 478:

> "Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. * * * There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. *Volunteered statements of any kind are not barred by the Fifth Amendment* and their admissibility is not affected by our holding today." (emphasis added).

The Court went on to say that *Miranda* is not intended to hamper the traditional function of police officers in investigating crime, 384 US at 477-478:

> "Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement."

In enunciating the Fifth Amendment standard for determining when compulsion has occurred, which the *Miranda* Court cited *Bram* v *United States*, 168 US 532, 549 (1897):

> "The rule is not that in order to render a statement admissible the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say, that from the causes, which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, *the accused was not involuntarily compelled to make a statement when but for the improper influences he would have remained slient.* . . ." *Miranda* v *Arizona, supra*, 384 US at 462 (emphasis added).

In the present case there were no "improper influences" which "involuntarily compelled" Defendant Jenkins to flee the scene of the stabbing and remain in hiding for more than two weeks. To the contrary, there were no compelling law enforcement influences acting upon him at all and his actions were entirely voluntary.

In *United States* v *Washington*, 431 US 181 (1977) the Court reemphasized that compulsion was the touchstone of the Fifth Amendment privilege. There the defendant had testified at a grand jury regarding a motorcycle theft. He had been fully warned of his rights, but was not warned of possible indictment. He was subsequently indicted and at trial the court granted a motion to suppress the grand jury testimony, but this Court reversed and held that the grand jury testimony could be used because it was not compelled, 431 US at 186-188:

> ". . . it is also axiomatic that the Amendment does not automatically preclude self-incrimination, whether spontaneous or in response to questions put by government officials. • • • Indeed, far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable. • • • Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions. Accordingly, unless the record reveals some compulsion, respondent's incriminating testimony cannot conflict with any constitutional guarantees of the privilege.
>
> "The Constitution does not prohibit every element which influences a criminal suspect to make incriminating admissions. • • • The constitutional guarantee is only that the witness be not *compelled* to give self-incriminating testimony. The test is whether, considering the totality of the circumstances, the free will of the witness was overborne." [citations and footnotes omitted, emphasis in original].

Here, Defendant Jenkins' actions of flight and subsequent concealment had evidentiary value as an incriminating admission, at least by inference, relevant to his credibility and possible guilty knowledge. Most importantly for Fifth Amendment purposes, there is no evidence in this record which

would even permit an inference that Defendant's actions were the result, in the words of the *Washington* Court, of his free will being overborne.

In *Michigan* v *Tucker*, 417 US 433 (1974) the defendant was arrested and interrogated before the *Miranda* decision issued, but was given all of the warnings required by *Miranda* except notice that he had a right to appointed counsel. The defendant stated that he did not want an attorney and went on to name an alibi witness who later supplied a story to police discrediting the defendant's story. At trial the defendant's statements were excluded but the witness' statements were admitted and this Court upheld the conviction, holding that the evidence derived from the police interrogation was admissible. The Court held that *Miranda* applied to the trial, but that the police conduct did not deprive the defendant of his Fifth Amendment privilege because there was no compulsion and the defendant's statements were voluntary. The police conduct did violate the *Miranda* prophylactic rules, but the deterrent purposes of the exclusionary rule would not be served by excluding the testimony because there was no willful or negligent conduct on the part of the police to be deterred and the evidence was not untrustworthy. The Court said that the Fifth Amendment privilege applied where there has been "genuine compulsion of testimony" 417 US at 440 and also stated, 417 US at 448, "Cases which involve the Self-Incrimination Clause must, by definition, involve an element of coercion since the clause provides only that a person shall not be *compelled* to give evidence against himself." (emphasis in original).

The fact that voluntary statements are admissible against a defendant was further demonstrated by this Court's per curiam opinion in *Oregon* v *Mathiason*, 429 US 492 (1977) in which the defendant made incriminating statements in response to questions from a police officer, but the questioning

took place in a context where his freedom to depart was not restricted in any way. The state court had held that the questioning took place in a "coercive environment", but this Court held that to be insufficient to invoke the *Miranda* protections, 429 US at 495:

> "Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect."

Schneckloth v *Bustamonte*, 412 US 218 (1973) involved a consent search of a car in which stolen checks were found. The defendant was convicted, but in subsequent habeas corpus proceedings the Court of Appeals granted him relief, holding that the state must demonstrate that consent to the search was uncoerced and that it was given with the understanding that consent could be withheld. This Court reversed and held that consent searches are governed by the traditional test of voluntariness as determined by examination of the totality of all the surrounding circumstances and that there was no absolute requirement that the police inform the subject of a right to refuse the consent search. In reaching that conclusion, the Court determined that the considerations underlying the *Miranda* decision are simply inapplicable because consent searches do not normally involve any inherently coercive tactics, 412 US at 247:

> "Indeed, since consent searches will normally occur on a person's own familiar territory, the specter of incom-

> municado police interrogation in some remote station house is simply inapposite. There is no reason to believe, under circumstances such as are present here, that the response to a policeman's question is presumptively coerced; and there is, therefore, no reason to reject the traditional test for determining the voluntariness of a person's response. *Miranda*, of course, did not reach investigative questioning of a person not in custody, which is most directly analagous to the situation of a consent search and it assuredly did not indicate that such questioning ought to be deemed inherently coercive."

From the foregoing cases we conclude that the admission of evidence concerning a defendant's voluntary actions prior to his being placed in custody does not violate the Fifth Amendment privilege against compelled self-incrimination. In the instant case, Defendant complains of the prosecutor's cross-examination and jury argument as to his flight from the scene of the stabbing incident and his failure to report the incident for more than two weeks. On the record of his case, however, there is no indication that Defendant's free will was in any way overcome or that the actions of the Defendant were anything but voluntary. There was no actual compulsion since there was no police involvement at all and, as indicated by both *Miranda* and subsequent cases including *Schneckloth*, police investigation of crime does not involve any inherently coercive aspects. Defendant's actions were completely voluntary on his part and therefore the Fifth Amendment privilege against compulsory self-incrimination simply does not come into play and evidence as to the Defendant's actions was admissible. The State does not assert any constitutional duty on the part of the Defendant to turn himself in to the police after the stabbing incident, but we do assert that he had no constitutional right to be free from cross-examination and prosecutorial comment as to actions which are not compelled in the

Fifth Amendment sense. Contrary to the assertion in Defendant's brief page 22, the State does not suggest that Fifth Amendment rights arise only upon arrest; we merely submit that where there has been no compulsion, there is no violation of the Fifth Amendment privilege. The State does not deny the Defendant enjoyed the benefits of the Fifth Amendment privilege of self-incrimination even before his arrest, but we assert that admission of evidence pertaining to his voluntary actions does not violate his constitutional rights.

Acceptance of Defendant's position in this case would require the Court to hold that the prosecution is constitutionally prohibited from introducing evidence regarding a defendant's voluntary actions or statements occurring prior to his arrest and receipt of the *Miranda* warnings. Adoption of that position would deal a moral blow to legitimate police investigative practices. Indeed, the potential effects of such a rule are virtually incalculable. If all of a defendant's voluntary extra-judicial actions and statements are inadmissible because of the Fifth Amendment privilege, one can only speculate as to the drastic reduction in the number of otherwise well-founded prosecutions which would occur. The rule which Defendant would have this Court adopt is completely unwarranted either by prior cases or generally recognized Fifth Amendment principles. Evidence of an individual's voluntary statements and actions has historically been admissible, assuming it meets other evidentiary standards of relevancy, materiality, etc. If, as in this case, there has been no coercion, no improper police procedures, and if the actions or statements are in fact voluntary as determined by examination of the totality of circumstances there can by definition be no violation of the Fifth Amendment prohibition against *compelled* self-incrimination and there is no principled basis for excluding such evidence.

II.

THE DEFENDANT'S DUE PROCESS RIGHTS WERE NOT VIOLATED AT HIS STATE COURT TRIAL BY THE PROSECUTOR'S CROSS-EXAMINATION AND JURY ARGUMENT RELATING TO THE FACT THAT DEFENDANT FLED FROM THE SCENE AND WAITED MORE THAN TWO WEEKS AFTER THE STABBING INCIDENT TO TURN HIMSELF IN TO THE AUTHORITIES.

The State has argued that under the circumstances of the instant case no violation of Defendant's Fifth Amendment privilege occurred. Even if it could be said, however, that Defendant's actions of fleeing the scene of the stabbing and waiting more than two weeks before turning himself in were within the scope of his Fifth Amendment privilege, it does not necessarily follow that the prosecutor's cross-examination and argument to the jury were constitutionally impermissible. In *Raffel* v *United States* 271 US 494 (1926), a defendant who took the witness stand and denied making a statement attributed to him by a prosecution witness was cross-examined concerning the fact that at a previous trial he had declined to testify as a witness on his own behalf. This Court found no violation of the Fifth Amendment privilege, holding that a defendant who takes the stand on his own behalf does so as any other witness and may be cross-examined as to the facts in issue. Because cross-examination as to the defendant's earlier silence might have a bearing on his credibility and on the truth of his own testimony in chief, this Court concluded that the questioning for impeachment purposes was proper.

There is no contradiction between *Raffel* and this Court's subsequent decision in *Griffen* v *California*, 380 US 609 (1965) which prohibits the prosecution's use of evidence concerning

a defendant's silence in its case in chief. In that case a defendant asserted the Fifth Amendment privilege in the course of the trial and this Court held that comment on his refusal to testify had the effect of penalizing the exercise of the privilege and so was impermissible. In *Raffel*, however, as in the instant case, the defendant's prior silence was not used as affirmative evidence of guilt, but merely for impeachment purposes. *Raffel* was distinguished on its facts in *Grunewald* v *United States*, 353 US 391 (1957) in which this Court held, in the exercise of its supervisory powers, that impeachment of the defendant by his prior silence at a grand jury proceeding was impermissible because on the facts of that case the prior silence was not in fact inconsistent with his assertion of innocence in the criminal trial. In reaching its decision, this Court noted that the determination of inconsistency was ordinarily a matter of the trial court's discretion and acknowledged the elementary rule of evidence that prior inconsistent statements may be used to impeach the credibility of a witness, including a criminal defendant, 353 US at 418. The *Grunewald* decision did not overrule *Raffel* and, at least by inference, supports the principle that under certain circumstances prior silence may be used to impeach a defendant's credibility.

This principle also finds support in *Harris* v *New York*, 401 US 222 (1971) and *Oregon* v *Hass*, 420 US 714 (1975) which held that voluntary, uncoerced statements taken in violation of the *Miranda* decision were admissible to impeach a defendant's credibility even though they were inadmissible in the case in chief. Additionally, this Court recently held that coerced statements could not be used for impeachment purposes, *New Jersey* v *Portash*, ... US ...., 59 L Ed 2d 501, 99 S Ct .... (1979).

In the present case, evidence of Defendant's prior voluntary actions was admitted only to impeach his credibility, not as substantive evidence of guilt, so even if those prior actions

are deemed to be protected by the Fifth Amendment privilege, the evidence and comment were permissible under *Raffel* and *Harris*. The prosecutor's cross-examination and jury argument did not directly challenge Defendant's self-defense claim, but since that claim was heavily dependent upon Defendant's assertions as to his state of mind, his credibility was at issue. The fact of his flight from the scene and concealment was relevant—although not conclusive—on the issue of his credibility and possible guilty knowledge and thus inconsistent with the claim of self-defense. The question of the admissibility of such evidence is primarily a matter for the trial court's discretion and that determination should not be readily overturned. Unlike *Grunewald* v *United States, supra,* 353 US 391, where this Court exercised its supervisory authority over its own lower court, the present case involves a request for federal habeas corpus from a state court conviction and thus a very strict standard of review is applicable. Relief may be granted only if this Court concludes that constitutional error was committed; mere evidentiary errors which do not result in a fundamentally unfair trial are not sufficient. *Donnelly* v *DeChristoforo,* 416 US 637 (1974).

In the instant case, the state submits that the Defendant's voluntary uncoerced flight from the scene of the crime and failure to turn himself in for more than two weeks do not implicate any Fifth Amendment privilege, and therefore the prosecutor's cross-examination and jury argument are permissible unless it can be said that they amount to a deprivation of due process, depriving Defendant of a fundamentally fair trial. In *Doyle* v *Ohio,* 426 US 610 (1976), this Court concluded that the use for impeachment purposes of a defendant's silence at the time of arrest and after receiving *Miranda* warnings violated due process because under such circumstances silence is "insolubly ambiguous" since it might be nothing more than reliance upon the *Miranda* warnings. In *United States* v *Hale,* 422 US 171 (1975), a case very similar to *Doyle,* this Court

exercised its supervisory authority and concluded that it was prejudicial for a trial court to permit cross-examination of a defendant concerning his silence during police interrogation after receiving the *Miranda* warnings. The Court noted that the "inherent pressures of in-custody interrogation . . . compound the difficulty of identifying the reason for silence" 422 US at 177, and concluded that the probative value of such silence was outweighed by possible prejudicial impact. This Court acknowledged the "basic rule of evidence" which provides that prior inconsistent statements may be used to impeach the credibility of a witness, but apparently felt that under the circumstances of in-custody interrogation after receiving *Miranda* warnings silence was not sufficiently inconsistent with a later explanatory story.

Defendant's actions of flight and concealment amount to more than mere silence and do not suffer from the insoluble ambiguity which was fatal in *Hale* and *Doyle.* That ambiguity derived from the *Miranda* warnings which had been given to the suspects whereas here Defendant Jenkins cannot have relied on such warnings because he was not in custody, was not under arrest, had no contact with police and thus, had not received any *Miranda* warnings. Furthermore, there is nothing in this record from which to infer that Defendant's actions were in any way taken in reliance upon a general understanding of his Fifth Amendment privilege.

The general rule regarding the admissibility of this type of evidence is stated in 2 J. Wigmore, *Evidence,* 3rd Edition, §276, p 111 (1940) as follows:

> "Flight from justice, and its analagous conduct, have always been deemed indicative of a consciousness of quilt.
> • • •

"It is today universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct are admissible as evidence of consciousness of guilt, and thus of guilt itself. . ."

Although the probative value of evidence that an accused fled the scene of a crime has been questioned, see *Wong Sun* v *United States*, 371 US 471, 493, fn 10 (1963), the admissibility of such evidence is well established in Michigan jurisprudence. The rule has been summarized by a noted commentator as follows, 1 Gillespie, *Michigan Criminal Law and Procedure*, 2nd Edition, §420, pp 639-640 (1979):

"Conduct of the accused, the logical inference from which would tend to show a consciousness of guilt, is admissible. Evidence of the conduct of a defendant, such as fabrication of false statements to exculpate him, attempts to mislead the prosecution, conceal his guilt, suppress testimony, procure perjured testimony, or acts indicating that alleged conspirators were devising means to avoid exposure, is admissible. • • •

"Evidence of flight from the place of the crime or from the state is admissible, and although flight may be as consistent with innocence as with guilt, it is for the jury to say whether under all of the circumstances of the case it is evidence of guilt." (footnotes omitted)

The foregoing statement finds support in numerous Michigan cases including *People* v *Cammarata*, 257 Mich 60, 240 NW 14 (1932); *People* v *Lewis*, 264 Mich 83, 249 NW 451 (1933); *People* v *Ranes*, 58 Mich App 268, 227 NW 2d 312 (1975); and *People* v *Casper*, 25 Mich App 1, 7, 180 NW 2d 906 (1970) where it is said:

"Michigan authority appears uniform in holding that actions by the defendant such as flight to avoid lawful arrest, procuring perjured testimony and attempts to destroy evidence, while possibly as consistent with innocence as with guilt, may be considered by the jury as evidence of guilt."

It should be noted that although under Michigan law the prosecutor could have introduced evidence of Defendant Jenkins' flight from the scene of the stabbing and failure to turn himself in for more than two weeks as substantive evidence of guilt, that evidence was only adduced upon cross-examination of the Defendant and was only used to attack Defendant's credibility. Under these circumstances any prejudicial effect on the Defendant was minimal because he had the opportunity to explain his conduct to the jury and, in fact, did so, App 37-38:

"Q. Was there any special reason why you went over to the Mayor's Bodyguard and to the Mayor and everything else to surrender yourself instead of going to the Police the same day when this happened, instead of waiting two weeks to go to the Mayor?

"A. Yes, it is.

"Q. What is the reason?

"A. Because I was afraid. Judge Gardner just had gave me probation.

"Q. You were afraid of whom?

"A. I was afraid what I had happened."

Such an explanation is not entirely unreasonable and in the instant case it appears that the jury must have given some credence to Defendant's claim regarding his state of mind

since it rejected the prosecutor's charge that the killing was committed with intent and premeditation and instead convicted him only of manslaughter which was defined in the court's instructions, in part, as a killing "committed under the influence of passion or in heat of blood produced by an adequate provocation and before a reasonable time has elapsed for the blood to cool." TT 337-338.

Evidence as to Defendant's flight and failure to turn himself in is of a type which has historically been admissible in criminal prosecutions. While not conclusive of guilt, such actions on the part of a defendant are probative as to consciousness of guilt and credibility, particularly where, as here, a defendant asserted self-defense and thus his credibility and guilty knowledge are extremely relevant. It cannot be doubted that the Defendant's actions were entirely voluntary on his part and because there is no suggestion of improper police procedures —indeed there was no police involvement of any kind— there can be no doubt as to the trustworthiness of the evidence. Under the circumstances of the present case it cannot fairly be said that the cross-examination and jury argument of which Defendant complains resulted in a fundamentally unfair trial.

III.

ANY CONSTITUTIONAL ERROR IN THE PROSECUTOR'S CROSS-EXAMINATION OF THE DEFENDANT OR IN THE CLOSING ARGUMENT TO THE JURY WAS HARMLESS BEYOND A REASONABLE DOUBT.

In *Chapman* v *California*, 386 US 18 (1967) this Court held that in certain circumstances constitutional error involving adverse comment upon a defendant's failure to testify in a state criminal trial may be harmless. Although under the circumstances of that case this Court concluded that the error

was not harmless, it enunciated the standard to be applied in making such determinations, 386 US at 24:

> ". . . before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

Although the instant case, like *Chapman*, involves allegations of improper prosecutorial argument, the two cases are distinguishable since they involve significant quantitative and qualitative differences.

An appendix to the *Chapman* opinion, 386 US 26-42, contains the argument and comments by the prosecutor on the failure of the defendants to take the witness stand. This 16-page excerpt from the prosecutor's argument was characterized as "continuously and repeatedly" impressing upon the jury that the defendants had, by their silence, "served as irrefutable witnesses against themselves" and that all inferences from the facts in evidence had to be drawn in favor of the state. 386 US at 25. This "machine gun repetition of a denial of constitutional rights, designed and calculated to make petitioners' version of the evidence worthless", 386 US at 26, is a far cry from the much more limited and restrained action by the prosecutor in the instant case. Here the prosecutor's cross-examination consists merely of neutral questioning of the Defendant regarding his actions between the time of the stabbing and his arrest more than two weeks later and the challenged comments to the jury consist only of suggestions of lessened credibility because of the delay. In this context it must recalled that a principal defense strategy involved argument to the jury that the prosecution witnesses had not presented a completely accurate picture of the stabbing incident (App 23) and that the defense, by diligent effort, came up with additional witnesses who testified to the true events. (App 48). Thus, the instant circumstances are somewhat akin to the

situation which existed in *Donnelly* v *DeChristoforo*, 416 US 637 (1974) where this Court found no deprivation of due process with respect to an allegedly improper prosecutorial argument. There, this Court noted that the argument was perhaps offered to rebut an argument by defense counsel and, after viewing the totality of circumstances, concluded that the isolated passages of the prosecutor's argument which were challenged did not reach proportions which "may profoundly impress a jury and may have a significant impact on the jury's deliberations." 416 US at 646.

In the instant case, Petitioner was charged with first degree murder which, under Michigan law, includes the elements of malice (intent to kill) and premeditation. The jury was properly instructed on the charge of first degree murder, TT 336-337, as well as the lesser included offense of second degree murder, TT 337, the elements of which are identical to those of first degree murder with the absence of premeditation. Defendant did not dispute his involvement in the stabbing or the homicide itself, but claimed self-defense and the jury was properly instructed as to this also, TT 339-340:

> "The Defendant has interposed a plea of Self-Defense, and under certain circumstances this is a good defense. The law gives every person the right to protect himself from an unlawful assault. Where an assault is made, the right to resist exists; but the resistance must be in proportion to the danger which is apprehended. It is not every assault that would justify a person in resisting by using a deadly weapon. Self-defense, in proper cases, is the right of every person, but it will not justify the taking of human life unless the Jurors are satisfied from the testimony; first, that the Defendant was not the aggressor in bringing on the difficulties; second, that there existed, at the time of the stabbing, in his mind, a present and impending necessity to stab in order to save himself from death or some great bodily harm; third, that there must have been no way open whereby he could have retreated, as it appeared to him at the time, to a place of safety and thus have avoided the conflict.
>
> "If, however, the person assailed honestly believes his life in danger, or, that he may suffer serious bodily harm, he has a right to resist, even to taking the life of his assailant. If the person assailed is to be judged by the circumstances and conditions as they honestly appeared to him at the time, it is not necessary to his defense that the danger should have been actual or real, or that the danger should have been impending and immediately about to follow. The actions and conduct of the Defendant are to be judged from the circumstances as they appeared to him at the time. One who is suddenly attacked by an adversary is not held to fine distinctions of judgment as to what is in the mind of his adversary, or, what his adversary is about to do, or to how much force it is necessary for him to use to protect his life or his person from serious bodily harm. It is for you to say, from all of the evidence in this cause, whether the Defendant honestly believed he was in danger of losing his life, or in danger of great bodily harm, and that it was necessary for him to stab the deceased to save himself from such apparent and threatened danger."

The jury rejected the prosecution's theory of murder as well as the Defendant's claim of self-defense and convicted him of manslaughter, the elements of which were defined for the jury as follows, TT 337-339:

> "The crime of murder may be reduced to Voluntary Manslaughter if the killing be committed under the influence of passion or in heat of blood produced by an adequate provocation and before a reasonable time has

elapsed for the blood to cool. And manslaughter is distinguished from murder in that with Voluntary Manslaughter:

"First, the mind or reason of the Defendant is at the time of the act, disturbed or clouded by mental or emotional excitement to an extent which might make an ordinary person likely to act rashly or without due deliberation or reflection and from passion, rather than judgment.

"Second, the cause of such disturbance must be something which would cause ordinary persons to act rashly. The law does not state what things are sufficient to prove such a reaction. Anything the natural tendency of which would be to produce such a state of mind in ordinary persons is sufficient.

"Third, the killing must result from such provocation or passion. That is, the killing must have occurred before a reasonable time had elapsed for the blood to cool and reason to resume its control. No precise time can be laid down. The test is whether or not a reasonable time had elapsed under these particular circumstances.

"Murder must be understood within the framework of the area called 'homicide'. Homicide has been defined as the killing of a human being by another human being, which in turn can be criminal or non-criminal. Non-criminal Homicide is called justified or excused. Justification or excuse takes many forms, but is commonly encountered in the form of self-defense or accident. The People in a murder case must exclude justification or excuse beyond a reasonable doubt in order for you to return a verdict of Guilty."

By its verdict, the jury clearly rejected the prosecution's theory that the killing was done with intent and with premeditation and also rejected the Defendant's self-defense plea, perhaps because the facts, even according to the testimony of defense witnesses, demonstrated that Defendant could have retreated and thus avoided the conflict, but did not do so.

The cross-examination and comments by the prosecutor which are here challenged relate merely to the timing of Defendant's arrest and the suggestion of lessened credibility because of the delay. The prosecutor's actions do not directly challenge the truth of Defendant's self-defense story and thus could have had no bearing on the jury's ultimate verdict of manslaughter. Given the Defendant's version of the evidence concerning the confrontation between him and the deceased, and given the jury's rejection of the prosecutor's arguments regarding intent to kill and premeditation, it cannot reasonably be said that the challenged cross-examination and jury argument contributed to Defendant's conviction of manslaughter and therefore any constitutional error in the prosecutor's arguments must be acknowledged to have been harmless beyond a reasonable doubt.

Although the brief of defendant refers to the prosecutor's cross-examination of certain defense witnesses, he does not appear to assert that such questioning violated any of his constitutional rights. Nor could he make such an assertion, since the only issue raised is the petition for a writ of certiorari dealt with his own cross-examination. (Brief for Defendant, pp 31, 32).

CONCLUSION AND RELIEF SOUGHT

The defendant's voluntary actions of fleeing from the scene of the stabbing and failing to report the incident to the police for more than two weeks do not fall within the scope of the Fifth Amendment privilege against compelled self-incrimination and therefore the prosecutor's cross-examination and comment to the jury on these issues did not violate Defendant's rights. Because the Defendant's voluntary actions were not taken in reliance upon any constitutional privilege, the "insoluble ambiguity" found in *Doyle* v *Ohio* is not present in the instant case. Evidence as to the defendant's flight and subsequent actions is of a type which has historically been admissible in criminal proceedings and because of its significant probative value and minimal prejudicial effect it cannot be said that admission of the evidence violated defendant's due process right to a fundamentally fair trial. Even if the prosecutor's actions are somehow deemed to have violated defendant's constitutional rights, any such error must be deemed to be harmless beyond a reasonable doubt because by the jury's verdict it is clear that they rejected the prosecution's theory of an intentional and premeditated kill and accepted, at least in part, defendant's claim that the killing had occurred after a confrontation and struggle between himself and the deceased.

For the foregoing reasons Respondent Charles Anderson, Warden, State Prison for Southern Michigan at Jackson, Michigan urges this Court to affirm the judgment of the Court of Appeals which in turn affirmed the judgment of the District Court and denied the writ of habeas corpus.

Respectfully submitted,

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